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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

6 | SUZANNE JACKSON,

7 || Plaintiff,

No. C 11-2753 PJH

8 | V.

9 || WILLIAM FISCHER, et al..

## Defendants.

## ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS

11

12 Before the court is defendants' motion for judgment on the pleadings. Having read  
13 the parties' papers and carefully considered their arguments and the relevant legal  
14 authority, the court GRANTS the motion as follows.

## BACKGROUND

16 This case was filed in June 2011 by plaintiff Suzanne Jackson ("Jackson") against  
17 numerous defendants, including William Fischer ("Fischer"). Jackson alleges that when  
18 she met Fischer in October 2006, he presented himself as a sophisticated investment  
19 advisor with connections to high-tech issuers and access to early investment opportunities.  
20 She claims that Fischer fraudulently induced her to lend money to or invest in several  
21 business entities, by misrepresenting their prospects for financial success. These entities  
22 included defendants SpeciGen, Inc. ("SpeciGen"), PeerDreams, Inc. ("PeerDreams"),  
23 Notebookz, Inc. ("Notebookz"), iLeonardo.com, Inc. ("iLeonardo"), New Moon LLC ("New  
24 Moon"), and Sazani Beach Hotel ("Sazani Beach").

25 The procedural background of the case is as set forth in the December 20, 2013  
26 order re defendants' motions to dismiss the third amended complaint ("TAC") (Doc. 241).  
27 Briefly, Jackson filed the original complaint against 18 defendants, asserting claims of  
28 securities fraud under federal and state law and other common law claims. On December

1 5, 2011, Jackson filed the first amended complaint, against the same 18 defendants. In  
2 April 2012, Fischer filed for Chapter 7 bankruptcy protection in the District of Minnesota,  
3 claiming \$12 million in liabilities, and listing Jackson as the primary creditor.

4 On June 15, 2012, pursuant to stipulation, Jackson filed the second amended  
5 complaint ("SAC"), asserting claims against 20 defendants. Named as defendants were  
6 Fischer; Jon Sabes ("J. Sabes"); Steven Sabes ("S. Sabes"); Marvin Siegel ("Siegel"); Brian  
7 Campion ("Campion"); Lonnie Bookbinder ("Bookbinder"); Mani Kulasooriya  
8 ("Kulasooriya"); Jorge Fernandes ("Fernandes"); Joshua Rosen ("Rosen"); Steve  
9 Waterhouse ("Waterhouse"); Jean Paul a/k/a "Buzzy" Lamere ("Lamere"); SpeciGen;  
10 PeerDreams; Notebookz; iLeonardo; New Moon; Monvia LLC ("Monvia"); CII Ltd. ("CII");  
11 Sazani Beach; and Upper Orbit LLC ("Upper Orbit").

12 J. Sabes, S. Sabes, Siegel, and Campion were alleged to be officers and/or  
13 directors of SpeciGen; Bookbinder was alleged to be the CEO of SpeciGen; Lamere was  
14 alleged to be a "consultant" to SpeciGen; Kulasooriya was alleged to be a director of  
15 PeerDreams and New Moon; Fernandes was alleged to be a director of Monvia, New  
16 Moon, and PeerDreams; Rosen was alleged to be the CEO and a director of Notebookz  
17 and iLeonardo; Waterhouse was alleged to be a director of Notebookz; and CII was alleged  
18 to be the owner of Sazani Beach.

19 On July 17, 2012, Jackson filed an adversary proceeding in the Bankruptcy Court in  
20 Minnesota, challenging the dischargeability of Fisher's debt. Although the Bankruptcy  
21 Court discharged Fischer on July 19, 2012, the court entered judgment in the adversary  
22 proceeding on December 18, 2013, finding that the debt owed by Fischer to Jackson was  
23 non-dischargeable. This judgment was based on Fischer's agreement that he was  
24 indebted to Jackson in the amount of \$8.250 million, and his admission that his debt to  
25 Jackson was non-dischargeable under 11 U.S.C. § 523(a)(2)(A) because it was obtained  
26 "by means of false pretenses, false representations and actual frauds committed against  
27 [Jackson], as she alleged in her adversary complaint."

28 Meanwhile, on March 15, 2013, this court issued an order granting motions to

1 dismiss the SAC filed by several defendants. The dismissal was with leave to amend. On  
2 April 24, 2013, plaintiff filed the TAC, against the same 20 defendants. Four groups of  
3 defendants filed motions to dismiss – J.Sabes, S.Sabes, and Siegel; Kulasooriya and  
4 Monvia; New Moon; and Fernandes. (Campion, Rosen, Notebookz, and Waterhouse filed  
5 answers in lieu of moving to dismiss.) On December 20, 2013, the court issued an order  
6 granting the motions in part and denying them in part. Among other things, the court  
7 dismissed all claims asserted against Monvia, New Moon, and Lamere, with prejudice.

8 Remaining in the case as defendants following the December 20, 2013 order were  
9 Fischer, J.Sabes, S.Sabes, Siegel, Campion, Bookbinder, Kulasooriya, Fernandes, Rosen,  
10 Waterhouse, Upper Orbit (default entered), SpeciGen (default entered), PeerDreams  
11 (default entered), Notebookz, iLeonardo (default entered), CII, and Sazani Beach. Of  
12 these, there has been no appearance by Bookbinder, CII, or Sazani Beach, although the  
13 court also notes that none of the causes of action alleges any facts as to those three  
14 defendants.

15 Remaining in the case are the following causes of action:

16 (1) a claim of primary liability under § 10(b) of the 1934 Securities Exchange  
17 Act and Rule 10b-5 promulgated thereunder, against Fischer, Campion, Rosen, SpeciGen,  
18 PeerDreams, Notebookz, and iLeonardo;<sup>1</sup>

19 (2) a claim of primary liability under California Corporations Code §§ 25401  
20 and 25501, against Fischer, Campion, Rosen, SpeciGen, Peer Dreams, Notebookz, and  
21 iLeonardo;

22 (3) a claim of “control person” liability under § 20(a) of the 1934 Securities  
23 Exchange Act, against Fischer, J.Sabes, S.Sabes, Siegel, Campion, Kulasooriya,  
24 Fernandes, Rosen, Waterhouse, and possibly Bookbinder;

25 (4) a claim of “control person” liability under California Corporations Code

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27 <sup>1</sup> However, as noted in the order re the motion to dismiss the SAC (and reiterated in  
28 the order re the motion to dismiss the TAC), Jackson has conceded that Fischer was the only  
“speaker” (at least as to J.Sabes, S.Sabes, Siegel, Kulasooriya, and Fernandes), and thus the  
only potentially viable defendant under § 10(b) and Rule 10b-5.

23 Now before the court is the motion of defendants Siegel, J.Sabes, S.Sabes,  
24 Campion, Kulasooriya, Fernandes, Rosen, and Waterhouse pursuant to Federal Rule of  
25 Civil Procedure 12(c) for judgment on the pleadings as to the third cause of action for  
26 violations of § 20(a) of the Securities Exchange Act, the fourth cause of action for violations  
27 of California Corporations Code § 25504, and the ninth cause of action for violations of  
28 California Corporations Code § 25501.5.

## DISCUSSION

## A. Legal Standard

A motion for judgment on the pleadings pursuant to Rule 12(c) “challenges the legal sufficiency of the opposing party’s pleadings.” William W Schwarzer et al, Federal Civil Procedure Before Trial ¶ 9:316 (2014 ed.) (emphasis in original); Fed. R. Civ. P 12(c). The legal standards governing Rules 12(c) and 12(b)(6) are “functionally identical,” Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989), as both permit challenges directed at the legal sufficiency of the parties’ allegations. See also Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012). Thus, judgment on the pleadings is appropriate when the pleaded facts, accepted as true and viewed in the light most favorable to the non-moving party, entitle the moving party to a judgment as a matter of law. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1301 (9th Cir. 1992); see also Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009).

The standard articulated in Twombly and Iqbal applies equally to a motion for judgment on the pleadings, as to a motion to dismiss for failure to state a claim. Chavez, 683 F.3d at 1108-09; Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054-55 & n.4 (9th Cir. 2011); see also Lowden v. T-Mobile USA, Inc., 378 Fed. Appx. 693, 694, 2010 WL 1841891 at \*1 (9th Cir., May 10, 2010). “[T]he tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions.” Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). Indeed, “a plaintiff’s obligations to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atlantic Corp. v. Twombly, 550 U.S. at 544, 555 (2007) (citations and quotations omitted). Rather, the allegations in the complaint “must be enough to raise a right to relief above the speculative level.” Id.

In actions alleging fraud, “the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). The plaintiff must allege facts showing the “time, place, and specific content of the false representations as well as the identities of the

1 parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)  
2 (citations omitted). "[A]llegations of fraud must be specific enough to give defendants  
3 notice of the particular misconduct which is alleged to constitute the fraud charged "so that  
4 they can defend against the charge and not just deny that they have done anything wrong."  
5 Sanford v. MemberWorks, Inc., 625 F.3d 550, 558 (9th Cir. 2010) (citation and quotation  
6 omitted). In addition, the plaintiff must do more than simply allege the neutral facts  
7 necessary to identify the transaction; he must also explain why the disputed statement was  
8 untrue or misleading at the time it was made. Yourish v. California Amplifier, 191 F.3d 983,  
9 992–93 (9th Cir. 1999).

10 B. Defendants' Motion

11 In the present motion, defendants J.Sabes, S.Sabes, Siegel, and Campion ("the  
12 SpeciGen defendants"); Kulasooriya and Fernandes ("the PeerDreams defendants"); and  
13 Rosen and Waterhouse ("the Notebookz defendants") seek judgment on the pleadings with  
14 respect to the "secondary liability" claims – the third claim for relief under § 20(a) of the  
15 Securities Exchange Act of 1934; the fourth claim for relief for violations of California  
16 Corporations Code § 25504; and the ninth claim for relief under California Corporations  
17 Code § 25501.5.

18 They assert that the TAC does not allege facts sufficient to support a claim of  
19 primary liability against Fischer with regard to the securities transactions involving  
20 SpeciGen, PeerDreams, or Notebookz, and thus, that there can be no viable claims of  
21 secondary liability under either federal or state law.

22 1. Claim under § 10(b) and Rule 10b-5 of the Securities Exchange Act

23 Defendants argue that the TAC fails to state a claim against Fischer under § 10(b)  
24 and Rule 10b-5 in connection with Jackson's investments in SpeciGen, PeerDreams,  
25 Notebookz, and iLeonardo.

26 To state a claim for securities fraud under § 10(b) of the Securities Exchange Act of  
27 1934, and Rule 10b-5 promulgated thereunder, a plaintiff must plead a material  
28 misrepresentation or omission by the defendant; scienter; a connection with the purchase

1 or sale of a security; reliance; economic loss; and loss causation. Stoneridge Inv. Partners,  
2 LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008); see also Dura Pharm., Inc. v.  
3 Broudo, 544 U.S. 336, 341-42 (2005).

4 At the pleading stage, claims under § 10(b) and Rule 10b-5 must satisfy both Rule  
5 9(b) and the requirements of the PSLRA. In re VeriFone Holdings, Inc. Sec. Litig., 704  
6 F.3d 694, 701 (9th Cir. 2012). Under Rule 9(b), all elements of a securities fraud action,  
7 including loss causation, must be pled with particularity. Oregon Pub. Emps. Retirement  
8 Fund v. Apollo Grp. Inc., 774 F.3d 598, 605 (9th Cir. 2014).

9 In addition, the PSLRA requires that the complaint plead both falsity and scienter  
10 with particularity. See Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 990 (9th Cir.  
11 2009). That is, the complaint must “specify each statement alleged to have been  
12 misleading [and] the reason or reasons why the statement is misleading,” and must “state  
13 with particularity facts giving rise to a strong inference that the defendant acted with the  
14 required state of mind.” 15 U.S.C. § 78u-4(b)(1)-(2); see Tellabs, Inc. v. Makor Issues &  
15 Rights, Ltd., 551 U.S. 308, 321 (2007). If the complaint does not satisfy the PSLRA’s  
16 pleading requirements, the court, upon motion of the defendant, must dismiss it. 15 U.S.C.  
17 § 78u-4(b)(3)(A).

18 In the present motion, defendants contend that the TAC does not plead facts  
19 sufficient to state a primary violation by Fischer under either the PSLRA or Rule 9(b). They  
20 argue that the TAC does not adequately allege that Fischer made actionable false or  
21 misleading statements regarding SpeciGen, PeerDreams, or Notebookz/iLeonardo, and  
22 that the TAC does not allege particularized facts supporting a strong inference of scienter.

23 a. Falsity

24 Defendants argue that the TAC alleges no actionable false or misleading statement  
25 by Fischer, with regard to the investments in SpeciGen, PeerDreams, and Notebookz/  
26 iLeonardo. The PSLRA requires – whether alleging that a defendant “made an untrue  
27 statement of a material fact” or alleging that a defendant “omitted to state a material fact  
28 necessary in order to make the statements made, in the light of the circumstances in which

1 they were made, not misleading" – that the complaint "specify each statement alleged to  
2 have been misleading, the reason or reasons why the statement is misleading, and, if an  
3 allegation regarding the statement or omission is made on information and belief, . . . [that  
4 it] state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1).

5 In short, falsity must be pled with particularity. Zucco, 552 F.3d at 990-91. In  
6 addition, a plaintiff must plead "specific facts indicating why" the statements at issue were  
7 false. Ronconi v. Larkin, 253 F.3d 423, 434 (9th Cir. 2001). "[V]ague claims about what  
8 statements were false or misleading [and] how they were false" are subject to dismissal.  
9 Metzler Inv. GmbH v. Corinthian Colls., Inc., 540 F.3d 1049, 1070 (9th Cir. 2008).

10 A statement or omission is misleading in the securities fraud context "if it would give  
11 a reasonable investor the 'impression of a state of affairs that differs in a material way from  
12 the one that actually exists.'" Berson v. Applied Signal Tech., Inc., 527 F.3d 982, 985 (9th  
13 Cir. 2008) (citation omitted). To be actionable, statements must have been "known to be  
14 false or misleading at that time by the people who made them." Larkin, 253 F.3d at 430.  
15 The mere fact that "[a] prediction proves to be wrong in hindsight does not render the  
16 statement untrue when made." In re VeriFone, 11 F.3d at 871.

17 Finally, liability under Rule 10b-5 is limited to parties who actually "make"  
18 misstatements of fact. See Janus Capital Grp., Inc. v. First Derivative Traders, 131 S.Ct.  
19 2296, 2302 (2011) ("One 'makes' a statement by stating it."). In Janus Capital, the  
20 Supreme Court expressly rejected an attempt to rely on common law agency principles to  
21 extend primary liability to non-speakers under Rule 10b-5. See id. at 2304.

22 i. Investments in SpeciGen

23 Jackson alleges that her investments in SpeciGen were in the form of seven loans  
24 secured by promissory notes, which were "convertible" into either common or preferred  
25 stock, at SpeciGen's discretion, and which were issued on various dates from December  
26 2006 to the summer of 2008. TAC ¶ 86. She asserts that Fischer, acting as SpeciGen's  
27 "agent," made false or misleading statements at meetings at her home and in Fischer's  
28 office in October-November 2006, and in February 2007. TAC ¶¶ 87, 89, 90. She claims

1 that Fischer made the following false and misleading representations:

2           ● that SpeciGen's technology was a "proven concept," and that "publicly-  
3 traded pharmaceutical companies" (unidentified) were interested in partnering or licensing  
4 the technology – when in fact, no such companies had expressed any interest in the  
5 potential applications and products, and one of SpeciGen's "directors" (unidentified) had  
6 warned Fischer that the technology had not reached the "proof of concept" stage, TAC  
7 ¶ 87(a);

8           ● that "Series A round" financing promoted to Jackson would be  
9 sufficient to carry the company to its "exit strategy," at which point she could recover her  
10 investment at a profit – when in fact, substantial additional capital was going to be needed  
11 beyond the Series A round financing to even get to the point of seeking FDA approval, TAC  
12 ¶ 87(b);

13           ● that SpeciGen had an active "industrial research collaboration" with a  
14 "prominent biotech company" (unidentified) – when in fact, no such partnership existed and  
15 the (unidentified) "companies" approached as of that date had rejected such a proposal,  
16 TAC ¶ 87(c);

17           ● that SpeciGen's technology had been "validated" by a "commercial  
18 biotech company" (unidentified) – when in fact, its only revenues had been research grants  
19 from the government, and no "validation" had been received from any source, TAC ¶ 87(d);

20           ● that Jackson's Series A investment consisted solely of convertible  
21 promissory notes, with no disclosure that other investors had been offered common stock  
22 on a match to the convertible notes, which "diluted" Jackson's interest in the securities,  
23 TAC ¶ 87(e);

24           ● that the Series A round was fully subscribed and that the other  
25 investors were sophisticated and had biotech startup knowledge – when in fact, the round  
26 was less than half subscribed, none of the other investors had experience investing in  
27 startups, and the one SpeciGen "director" (unidentified) who did have such experience  
28 declined to invest because he thought the company's proposed capital structure would be

1 unattractive to venture capital or institutional investors in future rounds, TAC ¶ 87(f);  
2       ● that SpeciGen's "exit strategy" (the point at which Jackson would  
3 presumably recoup her investment) would come within 2-3 years – when in fact, SpeciGen  
4 had no legitimate basis for such an estimate, and unless an institutional investor or biotech  
5 company invested or bought the company's technology, it would be 15-20 years before the  
6 investment was recouped (if ever), TAC ¶ 87(g);  
7       ● that SpeciGen "had all of the licenses and patents needed to  
8 commercially develop its technologies" – when in fact, the company lacked "term rights" in  
9 all of its technologies and its licenses "required ongoing royalty payments that it could not  
10 maintain at the company's present burn rate," TAC ¶ 87(h);  
11       ● that the Series A offering was "moving along well" – when in fact,  
12 "they" had difficulty selling the offering and "desperately needed Jackson to make a  
13 substantial second investment in order . . . for the company to survive," TAC ¶ 89(a);  
14       ● that Genentech had "vetted the company's technology" – when in fact,  
15 Genentech had shown no interest in partnering with SpeciGen when it had been  
16 "approached," because of the immaturity of SpeciGen's progress with its unproven  
17 technology, TAC ¶ 89(b); and  
18       ● that "they" were in advanced discussions with "a public company and  
19 an established biotech company" (unidentified) regarding advanced research partnerships  
20 – when in fact, there were no such discussion underway, and "the one later research  
21 partnership reached was poorly structured" and SpeciGen could not use the resulting data,  
22 TAC ¶ 89(c).

23       Jackson asserts further that in none of the discussions with Fischer in October-  
24 November 2006 and February 2007, or in "subsequent communications through Fischer as  
25 directed by defendants J.Sabes, S.Sabes, Siegel, and Campion," was she told  
26       ● that the company CEO, Bookbinder, had just resigned, complaining of  
27 mismanagement by the directors, TAC ¶ 90(a);  
28       ● that one of the board members, Dr. David Goldsteen, had resigned

1 from the board over concerns regarding "unlawful financing irregularities," including the sale  
2 of securities to Jackson, as well as doubts about the viability of the company's technology  
3 and its plans for developing and commercializing it, TAC ¶ 90(b);

4           ● that SpeciGen had conducted fundraising activities in violation of the  
5 1933 Securities Act, which had "exposed the company to litigation that could put it out of  
6 business," TAC ¶ 90(c);

7           ● that the financial projections prepared by Campion and Siegel were  
8 short by more than 50% of what was needed to achieve the preliminary pretrial stage, TAC  
9 ¶ 90(d);

10           ● that more than six experienced biotech and Silicon Valley investors,  
11 including Suni Paul, Mark Pincus, David Hornik, Menlo Ventures, and August Capital, had  
12 passed on SpeciGen's effort to raise money, TAC ¶ 90(e);

13           ● that SpeciGen's cash flow was so "perilous" that it didn't even have  
14 money to meet its commitments to Bookbinder's separation agreement, and that J.Sabes  
15 and S.Sabes had refused to invest in the company, TAC ¶ 90(f), (g).

16           Defendants argue that the TAC fails to state a claim of primary liability against  
17 Fischer with regard to the SpeciGen investments. In general, they argue that the TAC does  
18 not specify exactly what Fischer said about SpeciGen or why the statements were false or  
19 misleading when made. In addition, they make a number of arguments about  
20 representations attributed to Fischer.

21           With regard to the alleged representations about SpeciGen's product development –  
22 e.g., that SpeciGen's technology was a "proven concept" that was "approaching a stage in  
23 which it could be commercialized," and that it had been "validated" by an unidentified  
24 "commercial biotech company" and "vetted" by Genentech, see TAC ¶¶ 87(a), (d), and  
25 89(b), defendants argue that the statements are vague and unclear, in that Jackson does  
26 not explain what is meant by "proven concept," "validated," or "vetted," and does not clearly  
27 explain why the statements were false or misleading at the time they were made, or provide  
28 any objective criteria by which the truth or falsity of the statements can be ascertained.

1       In response, Jackson claims to be astonished that defendants do not know what  
2 "proven concept" or "proof of concept" means, as she contends it is a "major milestone in  
3 biotech." She contends that in the SpeciGen context, "proof of concept" meant that the  
4 "so-called 'protein cages' designed to deliver therapeutic drugs to specific cancer cells  
5 would have been proven to fulfill their designed function in tests on small animals." She  
6 argues that no such tests were ever undertaken, and no responsible investor would have  
7 considered investing in SpeciGen to be a good risk.

8       The court agrees with defendants that the allegations that Fischer falsely  
9 represented that SpeciGen's technology was a "proven concept" that had been "vetted" by  
10 Genentech, and "validated" by an unidentified "commercial biotech company," TAC  
11 ¶¶ 87(a), (b), (d), are vague and conclusory. Jackson does not explain in the TAC what the  
12 SpeciGen technology was or what she means by "proven concept;" does not provide any  
13 clue as to what form the alleged "vetting" and "validation" took; does not identify either the  
14 "publicly-traded pharmaceutical companies" that were supposedly interested in partnering  
15 or licensing the technology, or the "commercial biotech company" that had allegedly  
16 "validated" the technology; and does not point to any contemporaneous facts showing why  
17 these alleged misrepresentations were false at the time they were made. The only  
18 explanation in the TAC as to why the representations were false is that an unidentified  
19 SpeciGen "director" had allegedly warned Fischer and J.Sabes that he thought the  
20 technology had not reached the "proof of concept" stage and that as of October 2006,  
21 SpeciGen was not yet even a "promising biotech company." TAC ¶ 87(a)(2).

22       As for the allegation that Fischer falsely represented that the SpeciGen technology  
23 had been "validated" or "vetted" by other companies, Jackson asserts that Fischer made  
24 this representation to give her a false sense of security and low risk. She claims that in  
25 making this representation, TAC ¶ 89(h), Fischer convinced her that Genentech had made  
26 a thorough review of the SpeciGen technology and had found it to be viable. However, the  
27 TAC does not include such allegations, as it simply refers to a representation that  
28 SpeciGen's technology had been "vetted" or "validated" without any explanation or

1 particularized details.

2 With regard to the allegation that Fischer stated that SpeciGen was in "advanced  
3 discussions with a public company and an established biotech company about advanced  
4 research prospects that would develop preclinical data sufficient to complete clinical trials,"  
5 TAC ¶ 89(c), defendants argue that the TAC fails to specify what Fischer actually said,  
6 whether he used the terms "advanced discussions" and "advanced research partnerships,"  
7 and if so, what he meant by those terms. Defendants also assert that the allegation that  
8 the statement was false "because no such discussions were underway" does not explain  
9 why the statement was false at the time it was made.

10 In response, Jackson argues that the existence of a research collaboration  
11 agreement with a respected biotech company is "key" both to scientific progress and to  
12 attracting investors, and that Fisher's representation caused her to experience a "false  
13 sense of security." She adds that at trial, her "industry expert" will testify that the existence  
14 of a research collaboration with a respected, established biotech company is key to  
15 scientific progress in product development.

16 Again, the court notes that Jackson is improperly seeking to introduce facts and  
17 theories that are not pled in the TAC. In addition, the allegations are insufficiently  
18 particularized, for the reasons argued by the defendants. In particular, Jackson does not  
19 specify whether the alleged statement regarding the "research collaboration" was false  
20 because SpeciGen was not discussing research partnerships with anyone, or because  
21 SpeciGen was discussing research partnerships but the discussions were only preliminary,  
22 or because the research partnerships were not likely to result in the development of  
23 preclinical data sufficient to complete clinical trials. Moreover, her speculation regarding  
24 future trial testimony of some expert has no place in an analysis of whether the TAC states  
25 a claim. Finally, she does not reconcile her claim that "no such discussions were  
26 underway" with the contradictory suggestion that some companies (including Genentech)  
27 had considered research partnerships with SpeciGen, see TAC ¶¶ 87(b), 89(b), and that  
28 SpeciGen eventually did form a research partnership with another company, TAC ¶ 89(c).

1       With regard to representations about SpeciGen's patent portfolio – the statement  
2 that "SpeciGen had all of the licenses and patents needed to commercially develop its  
3 technologies" (TAC ¶ 87(h) – defendants argue that Jackson fails to specify what Fischer  
4 said or why the statement was false or misleading at the time it was made. They contend  
5 that Jackson's assertion that the statement was false because SpeciGen's licenses  
6 "required ongoing royalty payments that it could not maintain at the company's present  
7 burn rate" is not an explanation as to why the statement that SpeciGen had all its licenses  
8 and patents was false, because she does not allege that Fischer told her that all such  
9 licenses and patents would be available to SpeciGen for free, or that he told her that royalty  
10 payments would be easy to make.

11       In response, Jackson asserts that she was misled into believing that the technology  
12 at the heart of SpeciGen's mission was in place with a long-term lock on its use. She  
13 contends that she was also misled with regard to the value of that technology (again  
14 referring to the vague term "proof of concept.") The court finds, however, that the  
15 allegations regarding SpeciGen's "technology" and its rights to "licenses and patents" are  
16 insufficiently detailed to satisfy the pleading requirements of the PSLRA.

17       With regard to representations about SpeciGen's fundraising prospects – such as  
18 the alleged statement that "the Series A offering was moving along well," TAC ¶ 89(a), and  
19 that it "would be sufficient to carry the company to its 'exit strategy,'" TAC ¶ 87(b),  
20 defendants assert that reasonable investors do not rely on vague statements of corporate  
21 optimism. Plaintiff's only response is that statements that the stock offering was "moving  
22 along well" confirmed earlier statements made by Fischer and led her to believe that the  
23 investments were safe and sound.

24       In the Ninth Circuit, "vague, generalized assertions of corporate optimism or  
25 statements of 'mere puffing' are not actionable material misrepresentations under federal  
26 securities laws" because no reasonable investor would rely on such statements. See In re  
27 Cutera Sec. Litig., 610 F.3d 1103, 1111 (9th Cir. 2010); Glen Holly Entm't, Inc. v. Tektronix,  
28 Inc., 352 F.3d 367, 379 (9th Cir. 2003). The alleged representations in TAC ¶¶ 87(b) and

1 89(a) appear to be little more than statements of corporate optimism regarding SpeciGen's  
2 prospects for obtaining financing for its future operations, or "mere puffery."

3       As for the statement that the Series A offering "would be fully sufficient to carry the  
4 company to its 'exit strategy,'" which "would come within 2-3 years," which Jackson alleges  
5 was false because the Series A offering would not raise enough money to get SpeciGen to  
6 preliminary trials, and because barring an acquisition or outside investment, it would take  
7 12-15 years "for a return on investment," TAC ¶ 87(b), (g), defendants argue that  
8 statements regarding fundraising prospects were simply predictions, and that the fact that a  
9 prediction ends up being incorrect does not render the statement untrue when made.

10      In response, Jackson asserts that the representation that the Series A round of  
11 financing would be sufficient to take SpeciGen commercial was false, because SpeciGen  
12 was years and millions of dollars away from seeking FDA approval, and was material  
13 because it misrepresented SpeciGen's capital requirements and the status of its  
14 technology. She contends that the representation that the offering was being subscribed  
15 by sophisticated investors was false because no institutional investor had agreed to invest,  
16 and even SpeciGen board members had refused to invest their own money. She also  
17 asserts that the timing of an "exit strategy" is critical information to investors, and claims  
18 that telling her that her investment would be returned in a 2-3 year time frame was "the  
19 equivalent of" telling her that the company was in an advanced stage of research and  
20 product development, and that her funds would be tied up for only a few years. She  
21 contends that at trial, she will have an "industry investment expert" explain "this and other  
22 claims" to the jury.

23      However, Jackson does not address defendants' argument that the representations  
24 regarding SpeciGen's financing and its "exit strategy" were simply predictions that did not  
25 pan out. As pled, the alleged representations do appear to have been little more than  
26 predictions. The fact that a prediction ends up being incorrect does not render the  
27 statement untrue when made. See In re Syntex Corp. Sec. Litig., 95 F.3d 922, 929 (9th  
28 Cir. 1996). A false prediction, without more, does not constitute actionable securities

1 fraud. See id. at 934; In re VeriFone, 11 F.3d at 871; In re Northpoint Commc'nns Grp., Inc.  
2 Sec. Litig., 184 F.Supp. 2d 991, 1004 (N.D. Cal. 2001); In re PetSmart, Inc. Sec. Litig., 61  
3 F.Supp. 2d 982, 992 (D. Ariz. 1999). Where an allegedly false or misleading statement is a  
4 prediction about future prospects, the plaintiff must allege with particularity facts showing  
5 that the initial prediction was clearly a falsehood at the time it was made. See In re Am.  
6 Apparel, Inc. S'holder Litig., 2013 WL 174119 at \* 27 (C.D. Cal. Jan. 16, 2013); Kane v.  
7 Madge Networks, N.V., 2000 WL 33208116 at \*6 (N.D. Cal. May 26, 2000).

8 As pled, many of the allegations regarding SpeciGen are largely classic “fraud by  
9 hindsight” allegations, not actionable under the federal securities laws. See In re Silicon  
10 Graphics, Inc. Sec. Litig., 183 F.3d 970, 988 (9th Cir. 1999) (Congress enacted the PSLRA  
11 in part to put an end to the practice of pleading “fraud by hindsight”); see also Larkin, 253  
12 F.3d at 430 n.12. The TAC repeatedly asserts that certain predictions proved incorrect –  
13 such as that plaintiff would recover her investment within 2-3 years; that SpeciGen was on  
14 target to partner with some unspecified biotech company or companies; that SpeciGen was  
15 in a good position as far as achieving its capital requirements; and that SpeciGen would  
16 have sufficient funding to reach some unspecified level of success with some unspecified  
17 technology.

18 However, vague allegations that certain predictions proved incorrect is not the same  
19 as alleging with particularity facts that show the initial prediction was a falsehood. See In re  
20 Am. Apparel, Inc. S'holder Litig., 855 F.Supp. 2d 1043, 1070 (C.D. Cal. 2012); see also In  
21 re Daou Sys., Inc., 411 F.3d 1006, 1021 (9th Cir. 2005) (“Although these projections might  
22 have been overly optimistic when made, they do not rise to the level of a material  
23 misrepresentation actionable” under the securities laws.). It is true that representations  
24 concerning the status of investments at the time Jackson's investment was being solicited –  
25 e.g., that the Series A round was fully subscribed and that the other investors were  
26 “sophisticated” and had “biotech startup knowledge” – are potentially actionable, but as  
27 pled, they are too lacking in specificity to provide the basis of a Securities Act violation.

28 Finally, the TAC alleges no facts showing “why the difference between the earlier

1 and later statements is not merely the difference between two permissible judgments, but  
2 rather the result of a falsehood.” See Philco Investments, Ltd. v. Martin, 2011 WL 500694  
3 at \*8 (N.D. Cal. Feb. 9, 2011); see also Larkin, 253 F.3d at 430 n.12 (fraud by hindsight is  
4 not actionable); In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1549 & n.8 (9th Cir. 1994)  
5 (claims of “fraud by hindsight” will not meet the requirements of Rule 9(b)). Overall, while  
6 Jackson disputes defendants’ assertion that the allegations of falsity are inadequately pled,  
7 she does not adequately respond to the argument that the TAC does not allege specific  
8 contemporaneous facts showing that any particular alleged statement by Fischer was false  
9 at the time it was made.

10 The court agrees with defendants that the allegations in the TAC generally do not  
11 plead sufficient facts to establish falsity. Many of the facts alleged in TAC ¶¶ 87 and 89 are  
12 not pled with particularity. Moreover, as noted below, the more significant problem with the  
13 allegations regarding the SpeciGen investments is that the TAC does not plead facts  
14 sufficient to create a strong inference of scienter as to Fischer.

## ii. Investments in PeerDreams

16 Jackson alleges that her investments in PeerDreams were made in the form of six  
17 convertible promissory notes she purchased between January 2007 and June 2009, four of  
18 which were allegedly converted into shares of PeerDreams common stock. TAC ¶ 103.  
19 She claims to have made the investments in reliance on oral statements by Fischer at  
20 meetings in December 2006 and January 2007. TAC ¶ 108. She asserts that Fischer  
21 made false representations about PeerDreams based on information he had obtained from  
22 Monvia, Fernandes, and Kulsooriya ("the Monvia defendants"), while acting as their  
23 "agent," in connection with the sale of convertible promissory notes and common stock.  
24 TAC ¶¶ 109-113.

25 In the TAC, Jackson asserts that the following statements were among the false and  
26 misleading representations made by Fischer regarding Peer Dreams:

27                   ● that Peer Dreams had a "marketing plan," prepared by Monvia,  
28 Fernandes, and Kulasekera, that called for profitable operations within 18 months in

1 operations targeted to various goals, when in fact, the plan had not been developed and did  
2 not exist, TAC ¶ 110(a);

3 • that Kulasooriya had extensive experience with comparable  
4 entrepreneurial software investments through his previous work at Yahoo Finance, when in  
5 fact, that previous experience was in the context of a large public company with substantial  
6 internal financing, risk assessment, and marketing capabilities of no relevance to a modest  
7 startup, TAC ¶ 110(b);

8 • that the (unidentified) "software and website" could be up and running  
9 in 12 months, when in fact, "they" knew it would take more than 18 months to develop it  
10 and as long to come up with a real marketing plan, TAC ¶ 110(c);

11 • that "based on the funds raised and needed in the next year,  
12 PeerDreams would be up and running and able [to] extract substantial profit as a fund  
13 raising platform apart from charities[,] when in fact, the funds raised and "sought to be  
14 raised" were insufficient to launch a single site profitably dedicated to any of the marketed  
15 uses, TAC ¶ 110(d);

16 • that "the funds raised in the first year would be sufficient to fund the  
17 development of 'white label' (private label) sites for specific institutions," when in fact, "the  
18 amount planned to be raised was insufficient to fund the development of a single white  
19 label site" (with, as plaintiff appears to be describing it, negative consequences), TAC  
20 ¶ 110(e).

21 Jackson asserts further that "through the spring and summer of 2007," she "was  
22 never told"

23 • that "the company" (unspecified) "had failed to conduct any market  
24 studies that would allow it to assess the revenues that might be realized relative to the  
25 investment needed to bring its product to market in a profitable manner," TAC ¶ 111(a);

26 • that "the company" (unspecified) lacked "any commitment from major  
27 nonprofit organizations to test or engage its product" and thus "had no idea of the likely  
28 market for it," TAC ¶ 111(b);

1                   •        that of "several company employees and executives, none of them had  
2 successful track records of commercializing software products in competitive markets, and  
3 lacked experience marketing web-based software products to nonprofit organizations," TAC  
4 ¶ 111(c);  
5                   •        that "more than three times the raised capital was needed to enter just  
6 half the markets identified to Jackson when she made her investments" and that "the  
7 rapidly deteriorating capital position" of "the company" (unspecified) would make it  
8 impossible to raise more funds, TAC ¶ 111(d);  
9                   •        that because additional funds "could not be raised," and because of the  
10 "burn rate" of its diminished capital, no 'white label' sites could be developed to raise  
11 operating revenue," and "the company" would likely "have to close its door within a year,  
12 TAC ¶ 111(e).

13               Defendants argue that the allegations in the TAC are insufficient to state a claim of  
14 primary liability against Fischer with regard to the PeerDreams investments. In general,  
15 they argue that the TAC does not specify exactly what Fischer said about PeerDreams and  
16 that it makes no attempt to plead contemporaneous facts establishing that any alleged  
17 statement regarding PeerDreams was false or misleading when made. In addition, they  
18 make a number of arguments about representations attributed to Fischer.

19               With regard to the allegation that PeerDreams had a "marketing plan" that called for  
20 profitable operations within 18 months, TAC ¶ 110(a), defendants argue that the TAC does  
21 not specify what Fischer allegedly said about PeerDreams' marketing plan, and alleges no  
22 facts showing the statement was false or misleading when made.

23               In response, Jackson contends that in December 2006 and January 2007, Fischer  
24 made a presentation based on information supplied by Kulasekera and Fernandes" which  
25 included "a claim that PeerDreams had a marketing plan that would enable it to reach  
26 operational profitability within 18 months." She asserts that she made three \$50,000  
27 investments in 2007 (in January, March, and May), and that had she been told there was  
28 no plan, she could have ended her funding.

1       With regard to the allegation that Kulasooriya, a founding director of PeerDreams,  
2 had extensive experience with comparable investments, TAC ¶ 110(b)(2), defendants  
3 assert that Jackson pleads no facts establishing that Kulasooriya lacked experience with  
4 comparable entrepreneurial software investments, and that she in fact concedes that  
5 Kulasooriya was experienced, but adds that his experience was not relevant to "a modest  
6 startup."

7       In response, Jackson asserts that Kulasooriya was presented as having been  
8 involved in "entrepreneurial risk projects" while working at Yahoo Finance, but that in fact,  
9 he was only a mid-level technical employee at Yahoo. Jackson contends that because  
10 PeerDreams was a very small company, the representations about the background of  
11 Kulasooriya were material to her investment decision. She claims that her "expert" will  
12 testify at trial that "no established venture firm or knowledgeable investor would sponsor a  
13 company with nonexistent management experience."

14       Defendants assert further that the allegations that PeerDreams' software and  
15 website would be up and running within 12 months, TAC ¶ 110(c); that PeerDreams would  
16 be profitable as a fundraising platform within a year, TAC ¶ 110(d); and that PeerDreams  
17 had enough money to "fund the development of 'white label' (private label) sites for specific  
18 institutions," TAC ¶ 110(e), represent classic claims of "fraud by hindsight," which is not  
19 actionable under federal securities laws. See Silicon Graphics, 183 F.3d at 988; see also Larkin, 253 F.3d at 430 n.12.

21       For example, defendants point to the allegation that Fischer stated that PeerDreams'  
22 website would be operational within a year, all the while "knowing" that it would take at least  
23 18 months to develop it and as long to come up with a real marketing plan. TAC ¶ 110(c).  
24 Defendants contend that Fischer's lack of clairvoyance does not constitute securities fraud.  
25 Similarly, they argue, the allegation that Fischer falsely predicted that the funds raised in  
26 the first year would be sufficient to fund the development of "white label" sites, whereas  
27 "the amount actually planned to be raised" was insufficient to accomplish that goal, is  
28 nothing more than an allegation that Fischer's predictions did not come to fruition.

1       In response, Jackson contends that the statement that PeerDreams would be  
2 profitable in 18 months and the statement that its website and products would be  
3 completed in a year were both false, and created “an illusion of a limited chronological risk  
4 window, and concealed the risk to [her] by presenting claims of imminent positive cashflow  
5 and profit.” Jackson claims that there was in fact no feasible plan to produce an  
6 independent, financially viable website product in 12 months, and that in addition, without  
7 plaintiff’s funds, PeerDreams would have had to shut its doors because there would have  
8 been no cash flow.

9       While the TAC attributes a number of allegedly false statements regarding  
10 PeerDreams to Fischer – such as the statement that there was a marketing plan (when  
11 there was in fact no marketing plan) and that Kulasooriya had a particular level of  
12 experience (when in fact he did not have that type of experience), but such statements are  
13 not adequately pled because the TAC alleges no specific contemporaneous facts showing  
14 that the statements were false at the time they were made, and her opposition does not  
15 point to any. Even more problematic, as discussed below, is the absence of any  
16 particularized facts showing that Fischer knew the statements were false at the time he  
17 made them.

18       While a statement of belief may be actionable if the speaker knows his opinion has  
19 no reasonable basis in fact at the time it is expressed, see Virginia Bankshares, Inc. v.  
20 Sandberg, 501 U.S. 1083, 1093-94 (1991), a false prediction, without more, does not  
21 constitute actionable securities fraud. See In re Syntex, 95 F.3d at 934. Where an  
22 allegedly false or misleading statement is a prediction about future prospects, the plaintiff  
23 must allege with particularity facts showing that the initial prediction was clearly a falsehood  
24 at the time it was made. See In re Am. Apparel, 2013 WL 174119 at \* 27. Here, at most,  
25 the TAC simply alleges that Fischer represented that PeerDreams would achieve a certain  
26 level of success within a stated period, and that his prediction did not come to pass.

27       As pled, many of the allegations against Peer Dreams are largely classic “fraud by  
28 hindsight” allegations, not actionable under the federal securities laws. See Silicon

1 Graphics, 183 F.3d at 988; see also Larkin, 253 F.3d at 430 n.12. The TAC repeatedly  
2 asserts that certain predictions proved incorrect – such as that PeerDreams' software  
3 would be up and running within 12 months, and that PeerDreams would be profitable as a  
4 fundraising platform within a year, and that Peer Dreams had sufficient money to fund  
5 future projects. However, vague allegations that certain predictions proved incorrect is not  
6 the same as alleging with particularity facts that show the initial prediction was a falsehood.  
7 See In re Am. Apparel, 855 F.Supp. 2d at 1070; see also In re Daou Sys., 411 F.3d at  
8 1021.

9 Defendants do not specifically address the alleged omissions, TAC ¶¶ 111(b)-(e)  
10 (allegations that "the company" failed to conduct marketing studies; that it "lacked any  
11 commitment from major nonprofit organizations" to test or engage its product; that the  
12 employees and executives lacked "successful track records" of commercializing and  
13 marketing software products; that more capital was needed to enter the markets identified  
14 to Jackson when she made her investments and that the "rapidly deteriorating capital  
15 position" of "the company" would make it impossible to raise more funds; and that "the  
16 company" would likely close its door within a year because funds could not be raised).  
17 Nevertheless, as discussed above with regard to the alleged misrepresentations, the TAC  
18 pleads no facts sufficient to create a strong inference of scienter as to these alleged  
19 omissions.

### iii. Investments in Notebookz/iLeonardo

21 Jackson alleges that her investments in Notebookz/iLeonardo were made in two  
22 parts. In February 2007, she acquired a \$50,000 convertible promissory note, and in April  
23 2007, she acquired a \$200,000 convertible promissory note. TAC ¶ 94(a), (b). Then "[i]n  
24 or about July, 2007," the two promissory notes were, "at the election of defendant Rosen  
25 and defendant Notebookz, converted into 507,694 shares of preferred stock." TAC  
26 ¶ 94(c).

27 Jackson asserts that "[t]he initial purchases" of the convertible promissory notes  
28 were made following (or at) three meetings in February and March 2007 (two at Fischer's

1 office and one at Jackson's home), at which Rosen and Fischer made presentations and  
2 Rosen or Fischer "mentioned the likelihood that Google would be a likely acquirer in the  
3 near to immediate future." TAC ¶¶ 94-96. She alleges that during these meetings, Fischer  
4 made the following false representations to her "to induce" her investments:

- 5           ●       that "the company" had raised sufficient capital to produce and market  
6 its product – when in fact, "it" had insufficient capital and "would need substantial further  
7 investment" beyond Jackson's contribution, TAC ¶ 97(a);
  - 8           ●       that "the company" had discussed its "business, management,  
9 financial affairs" and "the details of its offering" with Jackson – when in fact, "it" had "never  
10 disclosed the company's product, management, financial affairs, competing products or  
11 even the potential market for its products" other than to falsely claim to Jackson that "they"  
12 expected Google to acquire "the company," TAC ¶ 97(b);
    - 13           ●       that "the company" had given Jackson "the opportunity to review the  
14 company's facilities" – when in fact, she did not know where those facilities were located, or  
15 "anything about the company's staffing, equipment or product plans," TAC ¶ 97(c);
      - 16           ●       that "the company" had given her "the opportunity to review all the  
17 terms and conditions of its securities offerings" – when in fact, "the company" had "only  
18 delivered a signature page after the February 16 meeting through defendant Fischer and  
19 did not provide any documentation relating to its offering at the time of the sale of its  
20 securities to her," TAC ¶ 97(d).

21           Jackson asserts further that in late June or early July 2007, Fischer provided her  
22 with an "Investor's Rights Agreement" relating to "the preferred stock she was about to  
23 receive through the conversion of her promissory notes." She claims that this agreement  
24 made "a number of representations that were false," specifically

- 25           ●       that "[t]he company," through Rosen, "promised to provide a balance  
26 sheet, statements of income and cash flows within 120 days of the end of each fiscal year"  
27 – a promise "that was regularly breached and that deprived plaintiff of the ability to monitor  
28 her investments and act in response to the concealed deteriorating position" of "the

1 company," TAC ¶ 98(a); and

2           •     that "[t]he company," through Rosen, "promised that within 45 days of  
3 the close of the third quarter each year, that it would provide her with unaudited statements  
4 of income and cash flows, an unaudited balance sheet and a statement of stockholders'  
5 equity" – a promise "that was never kept," TAC ¶ 98(b).

6           Defendants argue that the allegations in the TAC are insufficient to state a claim of  
7 primary liability against Fischer with regard to the Notebookz/iLeonardo investments. In  
8 general, they argue that the TAC does not specify exactly what Fischer said about  
9 Notebookz/iLeonardo and that it makes no attempt to plead contemporaneous facts  
10 establishing that any alleged statement regarding Notebookz/iLeonardo was false or  
11 misleading when made. Defendants contend that the alleged oral statements made by  
12 Fischer are repeated in "vague and impressionistic terms," in a manner that is insufficient to  
13 allege falsity under the PSLRA.

14           Defendants also note that the TAC repeatedly refers to Notebookz and iLeonardo  
15 collectively as "the company," with the result that defendants are left to guess which  
16 company Fischer's alleged misrepresentations referred to (and which company the TAC is  
17 referring to). For example, with regard to the statements that Fischer and/or Rosen  
18 "expected Google to acquire the company" (TAC ¶ 97(b)), and regarding the possibility that  
19 "Google would be a likely acquirer in the near to immediate future" (TAC ¶ 96), defendants  
20 argue that Jackson has left them to guess which speaker said what about which company.

21           In her opposition, Jackson does not specifically address the fact that TAC fails to  
22 distinguish between Notebookz and iLeonardo. Jackson asserts that "Notebookz had a  
23 product called iLeonardo that presumably was in the same tech 'space' as Google."  
24 However, the TAC nowhere alleges that "Notebookz had a product called iLeonardo," but  
25 rather alleges that iLeonardo is a corporation and that Notebookz is a corporation.  
26 This reference to Notebookz and iLeonardo collectively as "the company" is fatal to the  
27 entire claim, because the TAC clearly alleges that they are two separate companies, but  
28 the TAC does not identify which company Fischer was talking about.

1 Jackson also asserts that even if defendants claim to be confused, “[w]e know that  
2 Mr. Fisher is not because he has potentially incurred \$250,000 of liability for himself by  
3 admitting to selling Notebookz securities to Mrs. Jackson based on ‘fraud’ and ‘false  
4 pretenses’” (referring to the judgment in the adversary proceeding). She claims that the  
5 court cannot dismiss “these defendants” given that “their fundraiser says he sold their  
6 securities through fraud.”

7 To the extent that Jackson is attempting to argue in her opposition that falsity is  
8 established by virtue of Fischer’s concession in the adversary proceeding that he sold her  
9 \$250,000 of Notebookz securities, the court finds this theory to be without merit. The TAC  
10 includes no allegations regarding the adversary proceeding judgment, and reliance on  
11 matters outside the pleadings is improper under the Rule 12(b)(6) standard. See  
12 Schneider v. Cal. Dep’t of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (court may not  
13 take into account additional facts asserted in a memorandum opposing a motion to dismiss,  
14 because such memoranda do not constitute pleadings under Rule 7(a)).

15 As for the allegation that either Fischer or Rosen mentioned “the likelihood that  
16 Google would be a likely acquirer” in the near to immediate future, TAC ¶ 96, Jackson  
17 argues that this statement is sufficiently specific. However, she alleges no facts showing  
18 that the statement was false at the time it was made. It is not sufficient for Jackson to  
19 argue, as she does in the opposition, that “[d]epositions of Rosen and Waterhouse would  
20 yield that information.” Under the PSLRA, a plaintiff is required to allege facts sufficient to  
21 support the claim without benefit of any prior discovery. See Tellabs, 551 U.S. at 313, 321.

22 In somewhat of a non sequitur, Jackson also asserts that the allegations about  
23 “capitalization” (referring to the allegation that Fischer and/or Rosen had represented that  
24 “the company” had raised sufficient capital to “produce and market its product,” see TAC  
25 ¶ 97(a)) are “sufficient to allow a jury to believe that Mrs. Jackson’s investments were  
26 induced through material misrepresentations.” She contends that “expert testimony about  
27 the significance of capitalization, along with expert testimony about the major deficiencies  
28 in Notebookz products” will allow the jury to conclude that plaintiff was defrauded. And, she

1 argues, "when Mr. Fischer's admission of fraud is added to the mix, this is a claim that is  
2 'plausible' under Iqbal and should go to the jury."

3 Jackson's claim in the opposition that her "expert" will testify that capitalization is a  
4 major criterion in an investment decision is misplaced in a motion for judgment on the  
5 pleadings, because she cannot look to matters outside the TAC to support the allegations.  
6 Moreover, the proffered "expert" testimony does not cure the absence of factual allegations  
7 that Fischer knew the alleged statement was false when made.

8 With regard to the allegations that Fischer falsely represented that "the company"  
9 had discussed with Jackson "the company's" business, management, and financial affairs;  
10 and that "the company" had given Jackson the opportunity to review "the company's"  
11 facilities and all the terms and conditions of its securities offering, TAC ¶ 97(b), (c), (d),  
12 defendants argue that Jackson cannot plausibly allege reliance (an essential element of a §  
13 10(b) cause of action) where – as here – she already possesses sufficient information to  
14 call the alleged false representations into question.

15 In response, Jackson argues that "Notebookz' disregard of investors and the  
16 meaninglessness of the subscription agreement it proffers underscores the fact of the  
17 manifestly false boilerplate in its subscription documentation," and asserts that "the  
18 document made false claims about what had been shown" to Jackson, and that  
19 defendants "fail to address the fact that [she] was not given the document before she  
20 invested," but rather was given only a signature page." The court notes, however, that  
21 Jackson cannot credibly claim to have relied on an alleged misrepresentation regarding her  
22 own due diligence investigation (whether or not she was given an opportunity to tour the  
23 facilities, or review the terms and conditions of the securities offering) when "the truth" was  
24 already in her possession.

25 With regard to the allegation that Fischer gave Jackson an "Investor's Rights  
26 Agreement" which falsely promised that "the company" would make certain financial  
27 information available to her at the end of the fiscal year, defendants assert that this does  
28 not state a claim for securities fraud. They contend that if anything, it is an allegation of a

1 failure to carry out a promise, which is a contract claim.

2 The court is unable to locate any response to defendants' arguments regarding the  
3 Investor's Rights Agreement. In general, defendants are correct that these allegations  
4 appear to relate more to a contract claim than to a claim for securities fraud.

5 Jackson's response to defendants' arguments regarding the allegations about  
6 Notebookz/iLeonardo is generally rambling and unfocused. While Jackson disputes  
7 defendants' assertion that the allegations of falsity are inadequately pled, she does not  
8 adequately respond to the argument that the TAC fails to plead specific contemporaneous  
9 facts showing that any particular alleged statement by Fischer was false at the time it was  
10 made.

11 b. Scienter

12 Defendants argue that the TAC fails to allege facts raising an inference that Fischer  
13 acted with scienter. To adequately plead scienter under the PSLRA, a plaintiff must "state  
14 with particularity facts giving rise to a strong inference that the defendant acted with the  
15 required state of mind." 15 U.S.C. § 78u-4(b)(2). Scienter is defined as "a mental state  
16 embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S.  
17 185, 193 n.12 (1976). A plaintiff must allege facts showing that the defendant made false  
18 or misleading statements "either intentionally or with deliberate recklessness." Zucco, 552  
19 F.3d at 991 (quotations omitted); see also In re NVIDIA Corp. Sec. Litig., 768 F.3d 1046,  
20 1053 (9th Cir. 2014) (quoting In re Silicon Graphics, 183 F.3d at 977) (recklessness  
21 satisfies scienter under § 10(b) "to the extent it reflects some degree of intentional or  
22 conscious misconduct").

23 Under Tellabs, the court must generally accept all factual allegations in the  
24 complaint as true. Id., 551 U.S. at 322. The court must then "consider the complaint in its  
25 entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6)  
26 motions to dismiss, in particular, documents incorporated into the complaint by reference,  
27 and matters of which the court may take judicial notice. Id. That is, the court "must review  
28 all the allegations holistically" when determining whether scienter has been sufficiently pled.

1 Matrixx Initiatives, Inc. v. Siracusano, 131 S.Ct. 1309, 1324 (2011) (quoting Tellabs, 551  
2 U.S. at 326). The relevant inquiry is “whether all of the facts alleged, taken collectively,  
3 give rise to a strong inference of scienter, not whether any individual allegation, scrutinized  
4 in isolation, meets that standard.” Tellabs, 551 U.S. at 323; see New Mexico State Inv.  
5 Council v. Ernst & Young LLP, 641 F.3d 1089, 1095 (9th Cir. 2011).

6 A strong inference of scienter “must be more than merely plausible or reasonable – it  
7 must be cogent and at least as compelling as any opposing inference of nonfraudulent  
8 intent.” Id. at 314. The inference must be that “the defendant[ ] made false or misleading  
9 statements either intentionally or with deliberate recklessness.” Zucco, 552 F.3d at 991  
10 (internal quotation marks omitted). Deliberate recklessness means that the reckless  
11 conduct “reflects some degree of intentional or conscious misconduct.” South Ferry LP,  
12 No. 2 v. Killinger, 542 F.3d 776, 782 (9th Cir. 2008). “[A]n actor is [deliberately] reckless if  
13 he had reasonable grounds to believe material facts existed that were misstated or omitted,  
14 but nonetheless failed to obtain and disclose such facts although he could have done so  
15 without extraordinary effort.” In re Oracle Corp. Sec. Litig., 627 F.3d 376, 390 (9th Cir.  
16 2010) (quoting Howard v. Everex Sys., Inc., 228 F.3d 1057, 1064 (9th Cir. 2000)).

17 Here, defendants assert, Jackson has pled no facts showing what Fischer knew or  
18 when he knew it. For example, they argue, the TAC does not identify a single email,  
19 internal report, or other contemporaneous document suggesting that any alleged  
20 misstatement was knowingly false when made. Rather, they argue, the TAC generally  
21 alleges that all “defendants” (presumably including Fischer), were “aware” that the  
22 defendant companies needed funding to survive, see TAC ¶¶ 131(a), (c), (d); and faced  
23 significant product development challenges, see TAC ¶ 87(b), (d). Defendants contend that  
24 these generic allegations could be applied to any startup company, and note that the TAC  
25 applies the same allegations indiscriminately to “all of the ‘34 Act defendants,” see TAC ¶¶  
26 130-132.

27 Defendants argue further that the TAC describes “routine corporate objectives” such  
28 as the desire to obtain financing and develop new products, but assert that the Ninth Circuit

1 has consistently rejected attempts to premise a strong inference of scienter on such  
2 allegations. See, e.g., In re Rigel Pharms, Inc. Sec. Litig., 697 F.3d 869, 884 (9th Cir.  
3 2012). “Facts showing mere recklessness or a motive to commit fraud and opportunity to  
4 do so provide some reasonable inference of intent, but are not sufficient to establish a  
5 strong inference of deliberate recklessness.” In re VeriFone, 704 F.3d at 701.

6 Here, however, defendants contend that the allegations in the TAC, which are not  
7 even specific to Fischer, do not “state with particularity facts giving rise to a strong  
8 inference that the defendant acted with the required state of mind,” as required by 15  
9 U.S.C. § 78u-4(b)(2). They argue that none of Jackson’s allegations are cogent or  
10 compelling enough to raise a strong inference of scienter, even when considered  
11 holistically.

12 In opposition, Jackson asserts that “scienter is present with regard to all  
13 defendants,” and claims that she has pled “a mix of facts that show multiple material  
14 misrepresentations and omissions.” She also contends that “[t]he documented  
15 misrepresentations and omissions describe statements of fact [that] are so inaccurate as to  
16 be either reckless or intentional.” She claims that the fact that their “only discernable  
17 purpose” was to induce her to invest in the defendant companies creates a strong inference  
18 that there was a compelling financial motive.” She argues that there is no innocent  
19 explanation for these misrepresentations and omissions, and that it would require “extreme  
20 mental acrobatics” to find that the alleged misrepresentations could have been made  
21 without intent.

22 In addition, Jackson reiterates that Fischer admitted in the Minnesota adversary  
23 proceeding that he defrauded her. She contends that under principles of issue preclusion,  
24 Fischer and the other defendants in this matter are precluded from litigating, for the second  
25 time, “the issue of Fischer’s fraudulent actions.” For this reason, she contends, Fischer’s  
26 primary liability under § 10b-5 has been decided and “cannot be relitigated.” She adds,  
27 however, that should the court determine that the TAC does not adequately state a claim  
28 against Fischer for primary liability under § 10(b) and Rule 10b-5, she should be given

1 leave to amend to plead additional facts obtained in discovery in the adversary proceeding.

2 The court finds that the TAC alleges no facts sufficient to support a strong inference  
3 of scienter as to Fischer. Rather than pleading "in great detail, facts constituting strong  
4 circumstantial evidence or deliberate reckless or conscious misconduct," In re Vantine  
5 Corp. Sec. Litig., 283 F.3d 1079, 1091 (9th Cir. 2002), the TAC's scienter allegations are  
6 lumped together, without the specification that Fischer knew anything at any particular time.  
7 In short, there are no allegations regarding what Fischer knew at the time any alleged  
8 misstatement was made, and no allegations of particularized contemporaneous facts  
9 showing that Fischer had any information – whether via internal documents, meeting notes,  
10 emails, or otherwise – that might cast doubt on any particular statement that he allegedly  
11 made at that time about any one of the defendant companies. See In re Read-Rite Corp.  
12 Sec. Litig., 335 F.3d 843, 847 (9th Cir. 2003).

13 The theory of fraud at the core of the TAC does not support a reasonable inference  
14 of fraud, much less one that is "strong," "cogent," and "compelling." See Tellabs, 551 U.S.  
15 at 314. At most, the TAC appears to simply describe "routine corporate objectives" such as  
16 the desire to obtain new financing and develop new products, which are insufficient to  
17 support or create a strong inference of scienter. See In re Rigel Pharms., 697 F.3d at 884  
18 ("allegations of routine corporate objectives such as the desire to obtain good financing and  
19 expand are not, without more, sufficient to allege scienter; to hold otherwise would be to  
20 support a finding of scienter for any company that seeks to enhance its business  
21 prospects").

22 Jackson's argument in the opposition that Fischer's alleged misstatements were so  
23 egregious that they could only have been made with intent to defraud or deliberate  
24 recklessness is without merit, and similar arguments have been repeatedly rejected by  
25 courts in this Circuit. Allegations that defendants "must have known" or "could have known"  
26 that their statements were false or misleading when made do not satisfy the PSLRA's  
27 standard for pleading scienter. See, e.g., Zucco, 552 F.3d at 998; Metzler, 540 F.3d at  
28 1068.

1        As for Jackson's repeated assertion in the opposition that the judgment in the  
 2 Minnesota adversary proceeding effectively proves Fischer's liability for fraud under the  
 3 PSLRA, the court cannot consider the adversary proceeding judgment in deciding whether  
 4 the TAC states a claim for relief, in part because the judgment was issued after the TAC  
 5 was filed and thus is not referenced in the TAC.

6        There are no facts alleged in the TAC showing what Fischer knew or when he knew  
 7 it, and nothing contemporaneous suggesting that any alleged misstatement by Fischer was  
 8 knowingly false when made. In her opposition, Jackson simply repeats the conclusory  
 9 allegation that all "defendants" – presumably including Fischer but not distinguishing among  
 10 defendants – were "aware" that the defendant companies needed funding to survive, TAC ¶  
 11 131(a), (d), (d), and faced significant product development challenges, TAC ¶ 87(b), (d).

12        Scienter must be alleged as to each defendant separately. See Apollo Grp., 774  
 13 F.3d at 607 (citing Glazer Cap. Mgmt, LP v. Magtistri, 549 F.3d 736, 743-44 (9th Cir. 2008)  
 14 (adopting a theory of "collective scienter" in certain limited circumstances));<sup>2</sup> see also In re  
 15 NVIDIA, 768 F.3d at 1063. Here, the TAC does not allege facts showing that Fischer knew  
 16 that any of the alleged false statements were false, much less that he knew they were false  
 17 at the time he made them.

18            c.        Analysis

19        The motion to dismiss the claims of primary liability against Fischer is GRANTED.  
 20 The court finds that taken together, the allegations regarding falsity and scienter in the TAC  
 21 do not state a claim of primary liability as to Fischer under § 10(b) and Rule 10b-5.  
 22 Moreover, the fact that TAC includes claims and defendants that are no longer in the case  
 23 makes it difficult to sort out exactly what remains. Thus, the dismissal is with leave to  
 24 amend, in part to afford plaintiff the opportunity state a coherent claim and to eliminate all

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26       <sup>2</sup> The Ninth Circuit "may . . . impute scienter to individual defendants in some situations"  
 27 – for example, when it finds that a company's public statements are so "important and  
 dramatically false that they would create a strong inference that at least some corporate  
 28 officials knew of the falsity upon publication." Id. Here, Fischer was not a "corporate official,"  
 and thus scienter cannot be imputed to him under this theory. Moreover, the TAC does not  
 clearly allege that any of the defendant companies made false statements to plaintiff.

1 claims and all defendants that have been dismissed.

2 In addition, Jackson argues in her opposition that "a number of important events  
3 have occurred" since the filing of the TAC (in April 2013), and that those "events" support a  
4 finding of primary liability, as does Fischer's "confession" in the December 17, 2013  
5 stipulation for judgment in the Minnesota adversary proceeding. Jackson's repeated  
6 attempts to rely on allegations that do not appear in the TAC, while reciting assurances that  
7 the TAC's deficiencies will be remedied through discovery or evidence at trial, represents  
8 the exact approach that Congress sought to stop in enacting the PSLRA, when it included  
9 the requirement that the plaintiff plead particularized facts at the outset of the case. See  
10 Tellabs, 551 U.S. at 313, 321; see also 15 U.S.C. § 78u-4(b)(3)(b).

11 In this motion for judgment on the pleadings, Jackson's task in opposing defendants'  
12 motion is to establish that the TAC states a claim. Thus, Jackson cannot rely on  
13 information she did not plead or reference in the TAC – including the circumstances of  
14 Fischer's "admission" which gave rise to the judgment by the Minnesota Bankruptcy Court.  
15 Moreover, the question whether Fischer's "confession," standing alone, constitutes proof of  
16 primary liability under § 10(b) and Rule 10b-5 of the 1934 Securities Exchange Act (which  
17 have specific requirements both for pleading and proof) is not before the court.

18 Jackson suggests that because Fischer conceded in the Minnesota adversary  
19 proceeding that he had defrauded her, there is no longer any need to satisfy the  
20 requirements for pleading a claim for securities fraud under the PSLRA (which has very  
21 specific pleading requirements). However, while there is potentially a motion to be filed  
22 regarding the "res judicata" effect of the judgment in the adversary proceeding on the  
23 claims asserted in this action, Jackson cannot simply substitute that judgment for the  
24 requirement that she state a claim under the PSLRA.

25 As for Jackson's repeated assertion that "expert testimony" will show some fact or  
26 prove some theory, the court notes that the issue for resolution in the present motion is  
27 whether she has stated a claim of primary liability under the PSLRA against Fischer.  
28 Whether she can or cannot establish some fact by means of expert testimony is irrelevant,

1 as are her claims that "discovery will show" some fact or other.

2 2. Claim under §§ 25401 and 25501 of the California Corporations Code  
3 Defendants argue that the TAC fails to allege a primary violation against Fischer  
4 under § 25401 and § 25501. Section 25401 makes it unlawful  
5 for any person to offer to sell a security in this state or buy or offer to buy a  
6 security in this state by means of any written or oral communication which  
7 includes an untrue statement of a material fact or omits to state a material fact  
necessary in order to make the statements made, in the light of  
circumstances in which they were made, not misleading.

8 Cal. Corp. Code § 25401. Section 25501 provides a private right of action for violations of  
9 § 25401. "Any person who violates [s]ection 25401 shall be liable to the person who  
10 purchases a security from him or sells a security to him," unless the defendant proves that  
11 the plaintiff knew the true facts or that the defendant exercised reasonable care and did  
12 not know of the untruth or omissions. Cal. Corp. Code § 25501. Because § 25501 is  
13 derivative of § 25401, see Lubin v. Sybedon Corp., 688 F.Supp. 1425, 1453 (S.D. Cal.  
14 1988), a § 25501 claim must be dismissed if there is no viable claim under § 25401.  
15 Defendants contend that the TAC fails to state a claim against Fischer under § 25401  
16 because there are no facts pled showing that Fischer made any material misstatement, or  
17 that Jackson purchased securities from Fischer.

18 The second cause of action alleging violations of §§ 25401/25501 incorporates the  
19 prior allegations by reference (including all allegations relating to the § 10(b)/Rule 10b-5  
20 cause of action against SpeciGen, Notebookz, and PeerDreams), and asserts that "[t]he  
21 false and misleading statements and the material omissions set forth above relating to the  
22 sale of securities in SpeciGen, Notebookz, [and] PeerDreams . . . were such that, if  
23 conveyed in a truthful manner, would cause a reasonable investor to decline to invest."

24 TAC ¶¶ 134-137. The only specific mention of Fischer is in the allegation that

25 [t]he defendant companies, through the named officer and director  
26 defendants, engaged defendant Fischer to promote and sell their securities,  
27 and were specifically aware, as Mr. Fischer has testified, that he was selling  
their securities to Jackson. As such, Fischer was their agent and sold  
securities to Jackson in that capacity.

28 TAC ¶ 138. Defendants contend that, for the reason argued in their motion to dismiss the

1 § 10(b) and Rule 10b-5 claim, the TAC fails to allege facts showing that Fischer made a  
2 material misstatement regarding any of the defendant companies.

3 Defendants also note that §§ 25401/25501 “impose liability only on the actual seller  
4 of the security.” See Apollo Capital Fund LLC v. Roth Capital Partners, LLC, 158 Cal. App.  
5 4th 226, 253-54 (2007). They argue that Jackson has not – and cannot – allege that she  
6 purchased securities from Fischer, as opposed to the defendant companies. In support,  
7 they cite to stock purchase agreements she entered into with SpeciGen, PeerDreams, and  
8 Notebookz, copies of which are attached to declarations filed in support of defendants'  
9 motion, and as to which defendants request the court to take judicial notice.

10 In opposition, Jackson contends that the TAC adequately pleads a primary violation  
11 of §§ 25401/25501. She claims that the TAC is “replete with detailed itemizations of  
12 specific overt, affirmative misrepresentations.” However, she provides no further  
13 explanation apart from citing the allegations in TAC ¶¶ 87(a)-(h) (Fischer’s representations  
14 about SpeciGen); TAC ¶ 95(a)-(c) (reference is not clear, as ¶ 95 does not have sub-parts  
15 and does not allege representations by Fischer or anyone); and TAC ¶¶ 97(a)-(d) (Fischer’s  
16 representations about “the company,” which appears to be a reference to either Notebookz  
17 or iLeonardo).

18 Jackson asserts further that Fischer “offer[ed] to sell” her securities in each  
19 defendant company, and that he did so through “written and oral communications” that  
20 included “untrue statements of a material fact necessary to make the statements made, in  
21 light of the circumstances under which they were made, not misleading” in violation of  
22 § 25401. She also contends that under § 25501, Fischer sold securities, but then asks, “[I]f  
23 Mr. Fischer did not sell them, who did?” She asserts that, apart from some later meetings  
24 with the defendants, she made all her initial and most of her subsequent purchases through  
25 Fischer. She argues that unless the defendants can explain how she purchased the  
26 securities, if not through Fischer, then the claim that she did not purchase securities from  
27 Fischer must collapse. She adds that if defendants’ position is that the defendant  
28 companies sold the securities (rather than Fischer), then she should be granted leave to

1 "reopen the [c]ourt's dismissal with prejudice as to them based on Fischer's agency and on  
2 discovery showing direct misrepresentations made to Mrs. Jackson."

3 The court finds that the TAC fails to state a claim of primary liability under §§ 25401  
4 and 25501 as to Fischer. While the TAC does allege that Fischer made some statements  
5 that were false or misleading, it does not allege that Fischer sold plaintiff the securities.  
6 Both § 25401 and § 25501 impose liability only on the actual seller or purchaser of the  
7 security. Apollo, 158 Cal. App. 4th at 253-54. Jackson now asserts that "someone" must  
8 have sold her the securities, and if not Fischer, it must have been the defendant  
9 companies. She contends that if the defendants can argue that the defendant companies  
10 sold the securities, then she "should be granted leave to reopen the Court's dismissal with  
11 prejudice as to them based on Fischer's agency and on discovery showing direct  
12 misrepresentations made to [her]."

13 In the March 15, 2013 order granting the motions to dismiss the SAC, the court  
14 dismissed the § 25401 claim with leave to amend, to the extent that Jackson could allege  
15 that the moving officer and director defendants (J.Sabes, S.Sabes, Siegel, Kulasooriya,  
16 and Fernandes) sold securities to her. She did not correct that deficiency. In the  
17 December 20, 2013 order re the motion to dismiss the TAC, the court granted the motion of  
18 the moving parties (again, J.Sabes, S.Sabes, Siegel, Kulasooriya, and Fernandes) to  
19 dismiss the § 25401 claim as to the officer and director defendants, on the basis that the  
20 TAC failed to allege that any of those defendants (or any particular defendant) had made  
21 any material misstatement in connection with the sale of securities. The court noted that  
22 the only misstatements that were attributed to a particular individual were attributed to  
23 Fischer "as agent for" the various companies in which he solicited investments from  
24 plaintiff, and that in addition, the TAC did not allege that any of those defendant companies  
25 sold plaintiff any securities.

26 It appears that Jackson is requesting that the court allow her to seek reconsideration  
27 of the prior order re the motion to dismiss the TAC. However, the court previously granted  
28 leave to amend the claim in the order re the motion to dismiss the SAC, and cautioned

1 Jackson that if she did not allege that the director and officer defendants made false  
2 statements in connection with the sale of securities, a subsequent dismissal would be with  
3 prejudice. There is no basis for granting leave to seek reconsideration.

4       3.     Claim under § 25501.5 of the California Corporations Code

5       Defendants argue that the TAC fails to allege a claim of primary liability against  
6 Fischer under Corporations Code § 25501.5. By its terms, § 25501.5 establishes a private  
7 right of action in favor of a person who “purchases a security from” an unlicensed broker-  
8 dealer.

9       A person who purchases a security from or sells a security to a broker-dealer  
10      that is required to be licensed and has not, at the time of the sale or  
11      purchase, applied for and secured from the commissioner a certificate under  
12      Part 3 (commencing with Section 25200), that is in effect at the time of the  
13      sale or purchase authorizing that broker-dealer to act in that capacity, may  
14      bring an action for rescission of the sale or purchase or, if the plaintiff or  
15      defendant no longer owns the security, for damages.

16     Cal. Corp. Code § 25501.5(a)(1).

17       The TAC alleges that Fischer was “acting in . . . behalf” of the “individual and  
18      corporate defendants . . . to sell their securities, or the securities of the companies of which  
19      they were directors[;]” and that “[t]he individual and corporate defendants knew or should  
20      have known that Fischer was an unlicensed investment advisor, and failed to disclose that  
21      fact to Jackson[.]” TAC ¶ 189. Accordingly, “[s]aid defendants were therefore engaged in  
22      the promotion of the sale of unregistered securities through Fischer.” TAC ¶ 190.

23       In their first argument, defendants contend that while Jackson alleges that Fischer  
24      was an unlicensed broker-dealer, she does not – and cannot – assert that she purchased  
25      securities from him. They assert that the purchase agreements attached as exhibits to their  
26      request for judicial notice confirm that she purchased convertible promissory notes and  
27      preferred stock from the defendant companies – not from Fischer. As a result, they  
28      contend, plaintiff cannot allege a claim against Fischer under § 25501.5.

29       In their second argument, defendants assert that the § 25501.5 claim is time-barred.  
30      As the court noted in the order dismissing the SAC, the applicable statute of limitations for  
31      claims arising under § 25501.5 is either two years from the date of discovery or five years

1 after the violation, see Cal. Corp. Code § 25506(b); or three years, see Civil Code  
2 § 338(a) (three-year limitation period for claims created by statute. See *Jackson v. Fischer*,  
3 931 F.Supp. 2d 1049, 1066 (N.D. Cal. 2013). In opposing the motion to dismiss the SAC,  
4 plaintiff appeared to concede that the applicable limitations period was two years from the  
5 date of discovery. Id.

6 Section 25506 begins to run “when the plaintiff discovers the facts constituting the  
7 violation or in the exercise of reasonable diligence should have discovered them.” Kramas  
8 v. Security Gas & Oil Inc., 672 F.2d 766, 770-71 (9th Cir. 1982). Plaintiff alleges in the TAC  
9 that she “became concerned” about a \$1 million “trading account” with Fischer “[i]n or about  
10 summer 2008,” TAC ¶ 63, and that from the summer of 2008, Fischer began presenting  
11 “claims of progress to assuage her concerns about her investments,” TAC ¶ 69.  
12 Defendants assert that plaintiff’s own allegations confirm that a duty to inquire arose as  
13 early as the summer of 2008 – three years before plaintiff filed the initial complaint in this  
14 action.

15 “Generally speaking, a cause of action accrues at ‘the time when the cause of action  
16 is complete with all of its elements.’” Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797,  
17 806 (2007) (citation and quotation omitted). Where applicable, the discovery rule  
18 postpones accrual of a cause of action until the plaintiff discovers, or has reason to  
19 discover, the cause of action.” Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1192  
20 (citations and quotations omitted). The discovery rule requires a plaintiff to inquire  
21 into the existence of a cause of action when he/she has access to information that would  
22 prompt a reasonable party to do so. See Fox, 35 Cal. 4th at 807-08

23 In order to rely on the discovery rule for delayed accrual of a cause of action, a  
24 plaintiff must specifically plead facts showing the time and manner of discovery and the  
25 inability to have made earlier discovery despite reasonable diligence. McKelvey v. Boeing  
26 North American, Inc., 74 Cal. App. 4th 151, 160 (1999); see also Fox, 35 Cal. 4th at 808.  
27 In the order dismissing the SAC (which did not seek dismissal of the claims of primary  
28 liability asserted against Fischer), the court dismissed the § 25501.5 claim as to the moving

1 defendants, with leave to amend to (among other things) allege facts sufficient to show  
2 when Jackson discovered the alleged violation. Jackson, 931 F.Supp. 2d at 1067.

3 Here, defendants contend that plaintiff has never alleged facts showing when she  
4 discovered that Fischer was an “unlicensed broker” and why she could not have discovered  
5 the violation earlier. Defendants argue that having failed to plead facts necessary to  
6 support application of the discovery rule, plaintiff cannot now maintain a claim that is time-  
7 barred.

8 In opposition, plaintiff asserts that the TAC alleges that she purchased securities,  
9 TAC ¶¶ 86(a)-(e) (SpeciGen); TAC ¶¶ 94(a)-(c) (Notebookz); TAC ¶¶ 103(a)-(g)  
10 (PeerDreams); that her primary contact for the sales was Fischer, TAC ¶¶ 43, 45; that in  
11 some cases she gave her check directly to Fischer, TAC ¶ 46. Plaintiff characterizes  
12 defendants’ claim that she did not purchase securities from Fischer as “an argument more  
13 suited for Alice in Wonderland.” According to plaintiff, the issue is simple – if she did not  
14 purchase securities from Fischer, from whom did she purchase them?

15 Plaintiff adds that if she did purchase the securities from Fischer, the only remaining  
16 question is whether he was acting as a broker. She asserts that under Corporations Code  
17 § 25200, a broker-dealer is one “registered under the Securities Exchange Act of 1934, and  
18 that in turn, under the Securities Exchange Act of 1934, a “broker” is defined as “any  
19 person engaged in the business of effecting transactions in securities for the account of  
20 others.” 15 U.S.C. § 78a(c)(4)(A).

21 Jackson contends that Fischer meets this definition, and thus is subject to the terms  
22 of § 25501.5 on the plain face of the statute. She claims that he acted as a broker for the  
23 defendants, as he contacted plaintiff, made the sale, and either took her check to the issuer  
24 or directed her to the location where it should be sent. She argues that “[t]here is not a hint  
25 . . . of evidence in the pleadings, motion memoranda, depositions to date or even oral  
26 argument to suggest that any person other than Fischer ‘effectuated’ the sale within the  
27 meaning of [the] Exchange Act.” Thus, Jackson asserts, the violation of § 25501.5 is clear,  
28 as Fischer “acted as a broker, he was unlicensed, and he sold the securities.”

1 The court finds that the TAC fails to state a claim of primary liability under § 25501.5  
2 against Fischer. Section 25501.5 provides that a civil action for rescission or damages  
3 under that section is available only to a person who purchases a security from (or sells a  
4 security to) an unlicensed broker-dealer. Cal. Corp. Code § 25501.5(a)(1). Section  
5 25501.5 expressly requires privity of contract as a condition to liability, and the judicially  
6 noticeable purchase agreements reflect that plaintiff purchased the alleged securities from  
7 SpeciGen, PeerDreams, and Notebookz, not from Fischer, who did not hold title to the  
8 securities.

9       Were the statute of limitations issue the only problem with this cause of action, the  
10 court would grant leave to amend to allow plaintiff yet another opportunity to plead specific  
11 facts showing the time and manner of discovery and the inability to have made earlier  
12 discovery despite reasonable diligence. However, Jackson has alleged no facts showing  
13 that she purchased securities from Fischer (and she appears to concede in the opposition  
14 that she did not). Section 25501.5 does not provide for liability for a broker-dealer who  
15 acted as a placement agent for the actual seller, but did not actually sell the security to the  
16 plaintiff. Because Jackson fails to allege facts sufficient to establish a primary violation of  
17 § 25501.5 as to Fischer, the court need not consider whether § 25501.5 authorizes a  
18 private right of action against secondary actors who participate in a primary violation of  
19 § 25501.5

## CONCLUSION

21 It is with extreme difficulty that the court has pored through the TAC, the defendants'  
22 motion, and plaintiff's opposition, in an attempt to determine which allegations that do  
23 actually appear in the TAC are sufficient to state a claim, if any. As discussed above,  
24 because this is a motion for judgment on the pleadings, the court cannot consider facts that  
25 are not alleged in the TAC.

26 The court finds that the motion for judgment on the pleadings as to the claims of  
27 primary liability against Fischer under § 10(b) of the 1934 Securities Exchange Act, and  
28 Rule 10b-5 promulgated thereunder, must be GRANTED, with LEAVE TO AMEND. To

1 maintain a claim for control-person liability under § 20(a), a plaintiff must establish a claim  
2 of primary liability. See, e.g., Zucco, 552 F.3d at 990. Thus, because Jackson has not yet  
3 managed to state a claim of primary liability against Fischer, defendants cannot state a  
4 claim for secondary liability under § 20(a) of the Exchange Act as to Siegel, J.Sabes,  
5 S.Sabes, Campion, Kulasooriya, Fernandes, Rosen, and Waterhouse.

6 Based on the lack of any allegation that Fischer sold securities to plaintiff, the court  
7 finds that the motion for judgment on the pleadings as to the claims of primary liability  
8 against Fischer under California Corporations Code §§ 25401, 25501, and 25501.5 must  
9 be GRANTED. The dismissal is WITH PREJUDICE. For that reason, the motion for  
10 judgment on the pleadings as to the claims of secondary liability under Corporations Code  
11 § 25504 against Siegel, J.Sabes, S.Sabes, Campion, Kulasooriya, Fernandes, Rosen and  
12 Waterhouse is GRANTED.

13 The fourth amended complaint shall be filed no later than April 24, 2015. No new  
14 parties or claims may be added without a stipulation by the parties or the agreement of the  
15 court. As stated above, all claims and parties previously dismissed must be omitted from  
16 the fourth amended complaint.

18 | IT IS SO ORDERED.

19 || Dated: March 13, 2015

P. J. M.

**PHYLLIS J. HAMILTON**  
United States District Judge